

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JOSEPH LONNELL LEWIS,)	
)	
Plaintiff,)	
)	
v.)	Case No. CIV-10-1343-M
)	
HASKELL HIGGINS, <i>et al.</i> ,)	
)	
Defendants.)	

REPORT AND RECOMMENDATION

Invoking 42 U.S.C. § 1983, Mr. Joseph Lewis alleges retaliation through the issuance of misconduct charges. Defendants Department of Corrections, Higgins, Gilstrap, Hill, Hembree, Johnson, Wilks, Reading, Morton, Sanders, Tustin, Doyle, Jones, and Ingle have moved for summary judgment,¹ alleging in part that:

- they are immune from suit on the official capacity claims under the Eleventh Amendment and
- Mr. Lewis has not properly exhausted available administrative remedies.

Defendants’ Motion for Summary Judgment with Brief in Support at pp. 10-15 (Apr. 26, 2011). The Court should conclude that the Defendants are entitled to:

- Eleventh Amendment immunity on the official capacity claims for damages and
- summary judgment on the remaining claims based on nonexhaustion of administrative remedies.

¹ The present report does not address the claims involving Mr. Darryel Epperly or Ms. Beatrice Campbell.

BACKGROUND

While incarcerated, Mr. Lewis was found guilty on six disciplinary charges involving disobedience to orders, disruptive behavior, and possession/manufacture of contraband.² After fruitless efforts to appeal three of the misconduct convictions, Mr. Lewis alleges that he wrote to Internal Affairs and that the correspondence led to an investigation. Reply to Defendant's Motion for Summary Judgment and Special Report at pp. 4, 9 (June 6, 2011) ("Plaintiff's Response to Motion for Summary Judgment"). As a result of the correspondence to Internal Affairs, the Plaintiff claims retaliation through the issuance of misconduct charges on April 13, 14, and 15, 2009.³

Mr. Lewis claims retaliation and seeks "[i]mmediate release from the penitentiary and monetary relief." Complaint, *passim*. The Defendants are immune from suit on the official capacity claims for monetary damages under the Eleventh Amendment and are entitled to summary judgment on the remaining claims based on nonexhaustion of administrative remedies.⁴

² Special Report of Review of Factual Basis of Claims Asserted in Civil Rights Complaint Pursuant to 42 U.S.C. Section 1983, Attachments 3-4, 6, 8-10 (Apr. 26, 2011) ("Special Report"). In the complaint, Mr. Lewis refers to five of the six disciplinary charges. Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 at p. 3 (Dec. 13, 2010) ("Complaint").

³ See *supra* p. 1; Plaintiff's Response to Motion for Summary Judgment at p. 4; see *id.*, Exhs. 10-13, unnumbered exhibit, Doc. 43-1 at ECF pp. 47-48, 50-51, 56; see also Special Report, Attachments 8-10 (reports for misconduct on April 13, 14, and 15, 2009).

⁴ In seeking summary judgment, the Defendants also argue that: (1) the Plaintiff cannot seek expungement of misconducts under Section 1983, (2) any challenges to the misconducts would be premature absent proof of invalidation of the misconduct convictions in separate proceedings, (3) there is insufficient evidence of retaliation, and (4) qualified immunity exists. Defendants' Motion

ELEVENTH AMENDMENT IMMUNITY

Invoking the Eleventh Amendment, the movants argue that in their official capacities they enjoy immunity from damages. They are correct.

The Eleventh Amendment prevents an award of money damages when the defendant is a state official being sued in his official capacity. *See, e.g., Ellis v. University of Kansas Medical Center*, 163 F.3d 1186, 1196 (10th Cir. 1998) (“the Eleventh Amendment bars federal court jurisdiction over . . . a state official acting in her official capacity in a suit for damages”).⁵ Thus, in their official capacities, Defendants Department of Corrections, Higgins, Gilstrap, Hill, Hembree, Johnson, Wilks, Reading, Morton, Sanders, Tustin, Doyle, Jones, and Ingle enjoy immunity under the Eleventh Amendment on the claims for monetary relief. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 120 (1984).

FAILURE TO EXHAUST AVAILABLE ADMINISTRATIVE REMEDIES

According to the Defendants, Mr. Lewis failed to completely exhaust administrative remedies on the retaliation claim. Defendants’ Motion for Summary Judgment with Brief

for Summary Judgment with Brief in Support at pp. 7-10, 14-15 (Apr. 26, 2011). Because summary judgment is appropriate on grounds involving nonexhaustion of administrative remedies, the Court need not address the Defendants’ alternative arguments for summary judgment. *See infra* pp. 3-12.

⁵ An exception exists when the state waives Eleventh Amendment immunity or it is abrogated by Congress. *See Chaffin v. Kansas State Fair Board*, 348 F.3d 850, 866 (10th Cir. 2003). But the State of Oklahoma has not waived its Eleventh Amendment immunity. *See Okla. Stat. tit. 51 § 152.1(B)* (2001) (“it is not the intent of the state to waive any rights under the Eleventh Amendment to the United States Constitution”). And Congress did not abrogate the states’ Eleventh Amendment immunity through the enactment of Section 1983. *See Quern v. Jordan*, 440 U.S. 332, 345 (1979).

in Support at pp. 10-14 (Apr. 26, 2011). The Defendants are entitled to summary judgment on this ground.

I. Standard for Summary Judgment

The Court should grant summary judgment when “there is no genuine dispute as to any material fact and [the movants are] entitled to judgment as a matter of law.” Fed. R. Civ.

P. 56(a). Parties may establish the existence or nonexistence of a material disputed fact through:

- submission of “depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials; or”
- “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.”

Fed. R. Civ. P. 56(c)(1)(A)-(B).

When a summary judgment motion is filed, “[t]he court views the record and draws all favorable inferences in the light most favorable to the non-moving party.” *Pepsi-Cola Bottling Co. of Pittsburg, Inc. v. PepsiCo, Inc.*, 431 F.3d 1241, 1255 (10th Cir. 2005) (citation omitted).

Application of the summary judgment standard depends on whether the issue involves an element of the Plaintiff’s *prima facie* case or an affirmative defense.⁶

⁶ See *Johnson v. Riddle*, 443 F.3d 723, 725 n.1 (10th Cir. 2006) (discussing the difference in the application of the summary judgment standard for elements of the plaintiff’s *prima facie* case and affirmative defenses).

In relevant part, Defendants Department of Corrections, Higgins, Gilstrap, Hill, Hembree, Johnson, Wilks, Reading, Morton, Sanders, Tustin, Doyle, Jones, and Ingle seek summary judgment based on nonexhaustion of administrative remedies. *See infra* pp. 5-12. Because this issue involves an affirmative defense,⁷ the Defendants bear the burden of proof.⁸ As a result, the Defendants must demonstrate the absence of a disputed material fact on the issue of exhaustion. *See Hutchinson v. Pfeil*, 105 F.3d 562, 564 (10th Cir. 1997). If the Defendants satisfy this burden, the Plaintiff would incur a duty to “demonstrate with specificity the existence of a disputed material fact.” *Id.* In the absence of such a showing, the Defendants would be entitled to summary judgment on their affirmative defense. *See id.*

II. The Statutory Exhaustion Requirement

Federal law provides: “No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (2006). This law “requires proper exhaustion” of the prison’s administrative remedies. *Woodford v. Ngo*, 548 U.S. 81, 92 (2006).

⁷ *See Jones v. Bock*, 549 U.S. 199, 216 (2007) (concluding “that failure to exhaust is an affirmative defense under the [Prison Litigation Reform Act]”).

⁸ *See Roberts v. Barreras*, 484 F.3d 1236, 1241 (10th Cir. 2007) (“We . . . hold that the burden of proof for the exhaustion of administrative remedies in a suit governed by the [Prison Litigation Reform Act] lies with the defendant.”).

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